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NO. 85-236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HARRY EICHENLAUB, Warden Clinton County Jail
Petitioner

v.

DAVID ALAN YURKY, MR. ZIMMERMAN, Warden SCI at Huntingdon, MR. WICKER, Deputy Superintendent SCI at Huntingdon,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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Petition for Certiorari filed August 8, 1985
Certiorari granted January 13, 1986

JHP

QUESTION PRESENTED

Does due process require a hearing before an independent tribunal for a pretrial detainee transferred from a County prison to a State correctional institution on the basis of an emergency transfer as a security risk?

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BRIEF FOR PETITIONER

Petitioners, Harry Eichenlaub and his successors,[1] respectfully asks this Court to reverse the judgment of the

[1]Petitioner, Harry Eichenlaub, was killed in an automobile accident on July 13,

United States Court of Appeals for the Third Circuit with respect to its decision concerning Harry Eichenlaub.

OPINIONS BELOW

The Opinion of the Court of Appeals (P. App. A) is not reported. The Opinion of the District Court (P. App. B) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The Petition for Writ of Certiorari was granted on January 13, 1986.

1985. For purposes of the governmental liability, his successor, Arwyn Reish, is automatically substituted pursuant to S. Ct. Rule 40.3. All of the liability requested against Eichenlaub (J.A. 26, 27) is governmental in nature and not individual except the claim for punitive

CONSTITUTIONAL PROVISION INVOLVED

Amendment 14 §1. Citizens of the United States. All persons born or naturalizing.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within his jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. THE FACTS

The uncontroverted material facts in this case are that from December

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damages. Kentucky v. Graham, 105 S. Ct. 3099 (1985). Since Eichenlaub died prior to the time that the appeal was taken in this matter, a Motion is presently being sent to the United States Court of Appeals under F.R.A.P. 43 to substitute the Executor of the Estate of Harry W. Eichenlaub for purposes of any personal liability in this matter.

23, 1981, until January 8, 1982 (J.A. 87), Plaintiff was a pretrial detainee at the Clinton County Jail (CCJ). On January 8, 1982, Plaintiff was transferred to the State Correctional Institution at Huntingdon (SCIH) without being given a hearing wherein he might voice his opposition to said transfer (J.A. 88). On his arrival at SCIH, Plaintiff was assigned to Administrative Custody (AC) until such time as he could be taken in front of the Program Review Committee (PRC) (J.A. 89). This was accomplished on January 11, 1982 (J.A. 89). The PRC's determination at that time was that, pending a chance to gather more information about the Plaintiff, he should remain in AC (J.A. 90). Plaintiff did, in fact, remain in that mode of custody until February 9, 1982 (J.A.

120). During the time he was in AC, Plaintiff Yurky had all the access to his attorneys permitted by Bureau of Corrections (BOC) regulations (P. App. 17a, 18a). Over three months elapsed from the time Plaintiff was released from General Population (GP) to the time (May 19, 1982) that his trial began (P. App. 5b). During all relevant times Defendant Eichenlaub was the Warden of CCJ, Defendant Wicker was Deputy Superintendent at SCIH and Defendant Zimmerman was Warden of SCIH (P. App. 5a).

In addition, the Affidavit of Harry W. Eichenlaub filed with his Brief in the Court below as Exhibit "1" avers the following additional facts:

1. Eichenlaub was informed by Deputy Commissioner DeRamus on January 8,

1982, that inasmuch as this was an emergency transfer, "we'll (prison officials) have a hearing later" (J.A. 48).

2. Clinton County Jail was and is a minimum security institution, as is Centre County Jail (J.A. 41).

3. On May 19, 1982, Plaintiff began trial on the robbery, conspiracy, and criminal complicity actions. On May 19, 1982, he was convicted of these crimes and is presently serving a sentence at SCIH (J.A. 49).[2]

4. All of the allegations of Plaintiff's Complaint alleging deprivation of constitutional rights and right to any kind of liability are denied by Defendant Eichenlaub's Answer (J.A. 49).

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[2]Plaintiff Yurky was charged with two counts of bank robbery on January 8,

5. Eichenlaub received permission to transfer Plaintiff to SCIH while Plaintiff was at a Preliminary Hearing at State College, Pennsylvania (J.A. 49).

6. Eichenlaub harbors no ill will toward the Plaintiff, and at all times, he has acted the good faith belief that his actions were lawful (J.A. 49, 50).

Appellant Yurky was aware of his bail being raised to $300,000.00 and was aware of the condition existing at Clinton County Jail (J.A. 50, 51, 66).

1982. He was tried on these counts in Bellefonte on June 29, 1982. He was convicted and is presently serving a sentence of ten years minimum with respect to this conviction. This information was obtained in a phone conversation with Yurky's attorney who represented him in the bank robbery matter, Amos Goodall of Bellefonte, Pennsylvania.

Interrogatory No. 7 of Plaintiff to Defendant Harry Eichenlaub states the following:

> "7. What evidence was presented to Deputy Commissioner Erskind DeRamus in obtaining his oral approval for Plaintiff's transfer?"

ANSWER:

> "(1) That Plaintiff's bail had been raised to $300,000.00.
>
> (2) That mention had been made of a Palestine Liberation Organization connection of Plaintiff.
>
> (3) That there was information that Plaintiff had a passport to Lebanon.
>
> (4) That Plaintiff performed martial arts.
>
> (5) That Plaintiff would be charged certainly with bank robbery.
>
> (6) That our facility is old and our escape record was not good. (J.A. 66)."

B. THE DECISION OF THE DISTRICT COURT

After discovery, the parties filed Cross-Motions for Summary Judgment pur-

suant to a pro se civil rights action based upon 42 U.S.C. §1983. District Judge Richard Conaboy granted summary judgment for Defendant Harry Eichenlaub on the basis that a prima facia case had been found to exist against Plaintiff Yurky, at his preliminary hearing, and a factors approach had dictated that high bail, which Yurky failed to raise, be set (P. App. 9b). The District Court found that the Prison Review Committee Panel's Act of informing Yurky that he was considered a security risk was the sort of general notice mandated by the case of Cobb v. Aytch, 643 F.2d 946 (C.A. 3, 1981) and that there was nothing in the case to indicate that Defendants had deprived Yurky of any federally protected right (P. App. 11b), including effective assistance of counsel (P. App.

18b, 19b), and held that he was permitted to make phone calls during his detention and that he received legal mail on five occasions (P. App. 18b). In addition, there was no evidence that Yurky ever missed a pretrial hearing or was forced to seek a continuance of his case (P. App. 19b). Moreover, both of Yurky's lawyers work within an hour's drive of his place of confinement and had liberal visitation privileges (P. App. 19b). No argument was made by Yurky before the District Court that he was denied a speedy trial. Plaintiff Yurky did not raise or argue a lack of speedy trial claim before the District Court.

C. THE DECISION OF THE COURT OF APPEALS

Plaintiff Yurky appealed the District Court's ruling to the U.S. Court of Appeals for the Third Circuit. On May

10, 1985, the Circuit Court panel reversed the District Court holding with respect to Defendant Eichenlaub on the basis that the case of Cobb v. Aytch, 643 F.2d 946 (C.A. 3, 1981) mandated a hearing before an independent tribunal to be accomplished by Defendant Eichenlaub after the transfer of Yurky from the Clinton County Jail to the State Correctional Institution at Huntingdon (P. App. 8a-12a). The Court affirmed the summary judgment of the District Court that Plaintiff Yurky was not denied effective assistance of counsel (P. App. 17a, 18a). The Court used the same factual basis for granting the summary judgment as the District Court and in addition, stated that there was no evidence that any emergency arose during his time in prison, and that Plaintiff's

attorneys were free to visit him in prison (P. App. 18a). Respondent Yurky did not appeal the grant of summary judgment with respect to the effective assistance of counsel claim. Appellant Yurky did not argue or raise a claim that he was denied a speedy trial before the Court of Appeals.

SUMMARY OF ARGUMENT

No hearing before an independent tribunal must be accorded a pretrial detainee transferred as a security risk from a County prison to a State correctional institution in an emergency situation where the detainee had general notice of the reason for the transfer and had effective assistance of counsel. Plaintiff Yurky's failure to appeal the Court of Appeals' grant of summary judgment in favor of Defendants on

Plaintiff's lack of effective assistance of counsel claim removes all basis for application of the Fourteenth Amendment to this case.

ARGUMENT

I. NO HEARING BEFORE AN INDEPENDENT TRIBUNAL MUST BE ACCORDED A PRETRIAL DETAINEE TRANSFERRED AS A SECURITY RISK FROM A COUNTY PRISON TO A STATE CORRECTIONAL INSTITUTION IN AN EMERGENCY SITUATION WHERE THE DETAINEE HAD GENERAL NOTICE OF THE REASON FOR THE TRANSFER AND HAD EFFECTIVE ASSISTANCE OF COUNSEL.

This Court has delineated the type of process due a pretrial detainee in Bell v. Woolfish, 441 U.S. 520, 60 L.Ed. 99 S. Ct. 1861, 60 L.Ed. 2d 447 (1979). In addition, this Court has delineated the kind of process due persons in prison in Hewitt v. Helms, 459

U.S. 460, 103 S. Ct. 864, _____L.Ed. 2d_____ (1983). The District Court held that the due process given Respondent in this case was adequate (P. App. 9b). The Court stated:

> "Plaintiff Yurky was already validly incarcerated. A prima facia case had been found to exist against him and a factors approach had dictated that high bail, which Yurky failed to raise, be set."

The prison panel gave Yurky general notice of the reason for the transfer, that is, he was a security risk. Harry Eichenlaub did obtain the Court of Common Pleas' approval for the transfer and the record demonstrates that there was a rational basis for the transfer (J.A. 66).

The Circuit Court of Appeals held that the case of Cobb v. Aytch, 643 F.2d 946 (C.A. 3, 1981) controlled the case at

bar and that a hearing before an independent tribunal was required (P. App. pgs. 8a-12a).

A transfer of a prisoner from one prison to another does not infringe a protected liberty interest, Montanye v. Haynes, 427 U.S. 236, 96 S. Ct. 2543, 49 L.Ed. 2d 466 (1976). This has also been reitterated in the case of Olium v. Wakinekona, 103 S. Ct. 1741 (1983). The Court of Appeals held that Petitioner was not denied the effective assistance of counsel, and has held with respect to Petitioner that the only thing suffered by Respondent was the lack of a hearing before an independent tribunal. As was stated by this Court in Olium, supra, at 103 S. Ct. at 17-8, "process is not an end in itself. Its constitutional purpose is to protect a substance of

interest to which the individual has a legitimate claim of entitlement." Here, there is no such interest to protect. See also Jones v. Mabry, 723 F.2d 590 (C.A. 8, 1983).

II. PLAINTIFF SUFFERED NO LOSS OF PROCEDURAL DUE PROCESS, SINCE HE WAS AFFORDED THAT DUE PROCESS TO WHICH HE WAS ENTITLED.

A. THE CASE OF COBB V. AYTCH, 643 F.2d 946 (C.A. 3, 1981) IS DISTINGUISHABLE ON ITS FACTS.

In Cobb, the Third Circuit considered, inter alia, whether the transfer of pretrial detainees being held in Philadelphia-area correctional facilities to State institutions implicated a protectible liberty interest which would entitle the detainees to due process in connection with such transfer. That

Court concluded, based on the facts of that case, Id. at 960, that a federal liberty interest was involved in such transfers, and the detainees so affected were entitled to a pre-transfer hearing.

The undisputed facts of record established the following: detainees were transferred sizeable distances (at minimum 90 miles, at maximum 300 miles). Id. at 949. As a result, many transferred detainees were deprived of the assistance of their court-appointed counsel and in some cases missed court appearances and hearings when they were not returned to Philadelphia on time. Id. at 951. Due to ensuing continuances, the pretrial period of some inmates was prolonged, as was the eventual length of their sentences. Id. Additionally, visits to detainees by family and friends

were reduced, presumably due to the increased distance. Id. at 952. In some cases, restrictions were imposed on detainees' mail privileges in State institutes. Id.

As previously mentioned, the Court in Cobb determined that the specific facts of record implicated the detainees' Sixth Amendment rights to speedy trial and effective assistance of counsel and concluded that a protectible liberty interest was present under such circumstances. A similar conclusion on the facts of this case is not justified.

Yurky's transfer from CCJ to SCIH involved a difference in distance of approximately 60 miles.[3] At SCIH, Yurky

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[3]The change in Yurky's confinement did not result in sizeable increases in the distance between him and his attorneys. Yurky's attorneys were located in Lock Haven and Bellefonte. See Yurky's

had adequate means for effectively communicating with his counsel and any other parties with whom he may have chosen to correspond. Likewise, there is nothing of record which indicates that Yurky ever failed to appear in a Court proceeding or that the duration of his pretrial confinement was increased as a result.

In addition, the failure to argue denial of a right to speedy trial before the Court of Appeals and the Court of Appeals' holding, unappealed by Plaintiff Yurky, granting summary judgment in favor of Defendants on Plaintiff's claim of

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Responses to the Commonwealth Defendants' Interrogatories, filed November 18, 1982, at p. 18, no. 17. The Court may take judicial notice of the distances between the following places: between Huntingdon and Lock Haven, approximately 60 miles; between Bellefonte and Huntingdon, 40 miles; and between Lock Haven and Bellefonte, approximately 25 miles.

loss of effective assistance of counsel removes the underpinnings of a due process claim, such as was found in Cobb v. Aytch, supra. At the present time, there simply is no basis left open to Plaintiff upon which to base a claim for a hearing before an independent tribunal. Thus, unless this Court is willing to abandon its statement in the case of Olium v. Wakinekona, 103 S. Ct. 1741 (1983) that "process is not an end in itself", Olium, supra, at 103 S. Ct. 1748, the Court of Appeals should have granted Defendant Eichenlaub's summary judgment.

Accordingly, one of Yurky's attorneys (the one in Lock Haven) would have been required to travel only about one hour to visit him; the other much less. The attorney in Bellefonte would have to travel 25 miles to visit Yurky at Lock Haven and 40 miles to see him at SCIH, a difference of only about 20 miles. These differences are not comparable to those in Cobb.

Thus, the bases, legal and factual, on which the Cobb Court founded its decision were simply not present here, and Yurky cannot successfully assert a protected constitutional interest giving rise to procedural or substantive due process.

B. YURKY WAS PROVIDED WITH PROCEDURAL DUE PROCESS IN THE SENSE REQUIRED BY HEWITT V. HELMS, 459 U.S. 460, 103 S. CT. 864, 74 L.Ed. 2d 675 (1983).

It is submitted that the Cobb v. Aytch procedural requirements set forth in that case, 643 F.2d 946, 957-960, have been modified by the holding in Hewitt v. Helms, supra, as to what procedural due process is due in a prison transfer situation. What Plaintiff was entitled to in order to satisfy the due process

clause under the case of Hewitt v. Helms, supra, is: (1) Some notice of the charges against him; and (2) an opportunity to present his views to the prison officials charged with deciding whether to transfer him to administrative segregation. In the case at bar, Plaintiff did get some notice of the charges against him (that he was a security risk) by the BC-141D Form given him at the time that he arrived at SCIH. Further, Plaintiff had an opportunity on January 11 to present his opposition to the security risk matter to the Program Review Committee, the Committee established by regulation to decide what disposition should be made of an inmate upon his transfer to the institution.

In addition, an inmate must be given an opportunity to present his views to

the prison official charged with deciding whether to transfer him to administrative segregation in this case. See Hewitt v. Helms, 103 S. Ct. 864, 874. While Deputy Commissioner DeRamus made the decision to allow the transfer of Plaintiff to SCIH, it is submitted that the PRC Committee is the best instrument for allowing the Plaintiff to present his views to prison officials. Under the administrative regulations, the PRC has primary decision making power on where to place the inmate once he has arrived at the prison (see 37 Pa. Code Sec. 95.107) and is in a position to make recommendations to the Superintendent of Prisons regarding transfer of inmates. See 37 Pa. Code Sec. 95.103.

We are concerned in this case with an emergency transfer for security reasons,

where it is not necessary to have a hearing prior to transfer. See the regulations themselves and the case of Cobb v. Aytch, 643 F.2d 946 and 960 (C.A. 3, 1981) which recognizes this kind of situation. Although the Affidavit of present acting Commissioner of Corrections, Jeffes, states that it is the responsibility of transferring County officials to insure any hearing that may have been required in connection with the transfer of the inmate from a County facility to a State facility was held, this is not the Affidavit of the preparer of the memorandum, nor does it meet the emergency situation.

It is submitted that the memorandum governing emergency transfers provides for a hearing before the PRC Committee. Subsection III(F) of this memorandum is

set forth here in its entirety:

> "Emergency transfers may be approved orally by the Deputy Commissioner with all of the above procedures accomplished after-the-fact. In such cases of dire emergency, the prisoner shall be notified in writing of the transfer including the reason prior to the transfer. The required hearing procedures before the Program Review Committee, including 24 hour written notice in advance of the hearing shall be accomplished by the receiving institution in a timely manner. The inmate may waive the 24 hour advance notice in writing."

When this section is read in connection with the 24-hour Notice of Hearing provision of III(C)(1), it indicates that the question of who should hold the hearing in the case of an emergency transfer is arguably ambiguous, and, if clear either way, seems to indicate that the hearings shall be held by the PRC Committee.

There is another problem with any argument that the County warden in the

emergency transfer situation should be responsible for seeing that the hearing is held. The Helms v. Hewitt case, supra, indicates that the hearing should be held before those responsible for the decision to transfer. Warden Eichenlaub did not make the decision to transfer--he was powerless to do so. The decision was made by Deputy Commissioner DeRamus as provided in III of the Transfer Memorandum. Thus, it is submitted that the hearing should be held by prison officials at the transferee institution within the holdings of Helms v. Hewitt, supra.

While the case of Cobb v. Aytch, supra, did address in a very brief fashion the problem of emergency transfers (see 643 F.2d 946 at 961 in the context of wording of the injunction), it

is to be noted that the proper tribunal question was left open by the Court. Thus, it is submitted that Plaintiff, in fact, did receive due process concerning his transfer from CCJ to SCIH.

CONCLUSION

Defendant Eichenlaub and his successors request your Honorable Court to reverse the judgment of the Circuit Court of Appeals insofar as applicable to the Clinton County Warden and reinstate the decision of the District Court granting summary judgment in favor of Harry W. Eichenlaub.

Respectfully submitted,

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